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Supreme Court No. 88905-8
COA No. 67867-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JERAMIE OWENS,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH
COUNTY OF THE STATE OF WASHINGTON

The Honorable Richard T. Okrent
The Honorable Ronald Castleberry

ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF RESPONDENT

In a several-count jury trial, Jeramie Owens (Respondent herein) was acquitted on a charge of taking a motor vehicle without permission. On review, the Court of Appeals affirmed his other convictions for possession of a stolen vehicle and bail jumping, but reversed his conviction for “trafficking” of the vehicle for a new trial, under the alternative means doctrine. The State seeks review.

B. COURT OF APPEALS DECISION

In case no. 67867-1-I, the Court of Appeals reversed Mr. Owens' conviction for trafficking of a car he allegedly knew was stolen. The State at trial had chosen to place every statutory means of committing the crime of “trafficking” the jury instructions, and the prosecutor chose to not urge the jury in closing argument that the jurors should rely on a particular means in deciding guilt, both of which the State could well have done. In addition, there was no unanimity instruction or special verdict form. Therefore, because the Court of Appeals' review of the record showed that it could not be said that there was substantial evidence on every alternative means of trafficking that the State had placed before the jury, the Court reversed the conviction, for a new trial.

Seeking review of the unpublished Court of Appeals decision, the State complains that it has been unfairly burdened with ‘having to prove

every alternative means in the trafficking statute;' argues that this Court should require a statutory analysis that is less prone to finding that a criminal statute lists alternative means, and finally, urges this Court to adopt the federal case law standard, wherein a general verdict will be affirmed in an alternative means case simply where there is some evidence to support any one of the multiple alternative means in the statute.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

THE PETITIONER DISREGARDS THE STATE CONSTITUTIONAL BASIS FOR THE ALTERNATIVE MEANS DOCTRINE, AND MISTAKENLY CLAIMS THE DOCTRINE 'FORCES' THE PROSECUTOR TO PROVE EVERY ALTERNATIVE MEANS LISTED IN A STATUTE.

Review should not be granted. First, the State fails to note or ignores the fact that the alternative means doctrine (which the Court of Appeals applied in this case) is dictated by Mr. Owens' constitutional right to an expressly unanimous verdict under the state constitution. Wash. Const. art. 1, sec. 21.

Furthermore, the State's entire premise is incorrect, because the prosecution is never forced to place all the alternative means of the crime into the jury instructions, or to prove the same, except as may please its own choosing.

Finally, the State specifically seeks review under RAP 13.4(b)(1), but the Court of Appeals analysis of the RCW 9A.82.050 trafficking statute in this case does not in any way conflict with State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (jury instruction stating the three common-law assault definitions did not create alternative statutory means of committing second degree assault) (affirming rule that a definitional instruction or statute does not create additional "means").

1. The State seeks a change in Washington law that violates the state constitution, and review should be denied. The Court of Appeals in this case correctly applied the alternative means doctrine to protect Mr. Owens' state constitutional right to express assurances of jury unanimity.

Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to an *expressly* unanimous verdict. Ortega-Martinez, 124 Wn.2d at 707 (right to expressly unanimous jury verdict includes right to unanimity on means by which defendant committed crime) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987); State

v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982); and State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991)).¹

This constitutional dictate allows that a jury may be instructed on multiple or all of the statutory alternative means of committing a crime, and subsequently the defendant *may be convicted* by a general verdict; however, if there was no unanimity instruction or special verdict, and it also turns out on direct review by the Court of Appeals that the record fails to include substantial evidence of each of the alternative means that the State itself chose to have the jury instructed on, reversal for a new trial is required. State v. Strohm, 75 Wn. App. 301, 305, 879 P.2d 962 (1994) (citing State v. Kitchen, at 410-11); Court of Appeals Decision at pp. 5-6 and n. 6, 7, 8, 9,

¹ Wash. Const. art. 1, § 21 states: “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases ...” As this Court has stated:

Allowing juries of less than 12 in courts not of record, creates a right to 12-member juries in courts of record. Seattle v. Filson, 98 Wn.2d 66, 70, 653 P.2d 608 (1982), overruled on other grounds in In the Matter of Eng, 113 Wn.2d 178, 776 P.2d 1336 (1989). Additionally, by allowing verdicts of nine or more only in civil cases, the final clause implicitly recognizes unanimous verdicts are required in criminal cases. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Workman, 66 Wn. 292, 295, 119 P. 751 (1911).

State v. Ortega-Martinez, 124 Wn.2d at 707.

10) (citing Ortega-Martinez, at 707-08; Strohm, at 307; and State v. Howard, 127 Wn. App. 862, 872, 113 P.3d 511 (2005)).

In such trial circumstances, a general verdict *might* have emanated from an unanimous jury. However, Washington criminal defendants are entitled to more – a verdict that is both unanimous, and expressly so. Wash. Const. art. 1, § 21. In such circumstances, a general verdict is constitutionally inadequate.

The Petitioner cites federal case law upholding general verdicts in the face of insufficient evidence on some of the instructed-upon alternatives, and urges that this Court should engineer that result. Petition for Review, at pp. 1, 3-6, 10-14. But there is no federal constitutional right to jury unanimity or a special verdict as to the particular statutory alternative means of committing a crime. See Petition for Review, at pp. 3-4 (citing Schad v. Arizona, 501 U.S. 624, 630-33, 111 S. Ct. 2491, 115 L. Ed.2d 555 (1991); and Gilson v. Simmons, 520 F.3d 1196, 1209 (10th Cir. 2008)).

In seeking review, the State cites the entirety of RAP 13.4 subsection (b), but the State has not shown that any of those four bases for review by this Court supports granting review to abandon the Court's long-standing, uncontroversial reading of the state constitution, or to dispense with the alternative means doctrine which protects that document's grant of a right to express jury unanimity. Review should be denied.

2. The State's underlying premise is wrong. In this case the prosecution has been required on appeal to defend the question of sufficient evidence on each statutory means, only because it decided below to go to the jury on those means. The state constitutional right to express jury unanimity required vindication on appeal in Mr. Owens' case, only because the State chose to proceed in a given manner below in prosecuting the charge, which was a matter entirely of its own choosing. The prosecution is in control of which statutory alternative means it decides to charge for a given crime, in the information. State v. Dixon, 78 Wn.2d 796, 802-03, 479 P.2d 931 (1971). The prosecution at trial is in control of which of the statutory alternative means (one, some, or all) it decides to place before the jury in the instructions, and when the State below had no objection to the to-convict instruction for "trafficking," it became the law of this case. State v. Hickman, 135 Wn.2d 97, 103-04, 954 P.2d 900 (1998).

Even at the late juncture of closing argument, after the instructions have been read to the jury, the State can *still* choose to ask the jury to rely only on of the multiple alternative means listed in the instructions. State v. Witherspoon, 171 Wn. App. 271, 285-87, 286 P.3d 996 (2012) (citing State v. Lobe, 140 Wn. App. 897, 905, 167 P.3d 627 (2007)). On appeal, if the defendant argues there was no unanimity instruction and there was no special verdict in his alternative means case, and the jury was instructed on multiple

means, the State still prevails, if it made a clear selection of the means in closing, and the evidence was sufficient. State v. Witherspoon, 171 Wn. App. at 285.

However, if (as here) there is a mere general verdict and no unanimity instruction, and the State assented to the jury being instructed in the manner it was, and the State after all that chose not to clearly rely on a certain statutory means when seeking conviction in closing argument, the Washington Courts will step in to protect the defendant's right to an expressly unanimous verdict, by reversing where there was not substantial evidence to support each alternative means. Ortega-Martinez, at 707-08.

Unanimity and the Due Process right to proof beyond a reasonable doubt of the crime charged, under the Fourteenth Amendment and Wash. Const. art. 1, §21 and art. 1, §3, are safeguarded by this substantial evidence review, under which the Washington Courts will test whether the evidence was sufficient to prove each of the alternative means; where the evidence is constitutionally insufficient on one means, and there was only a general verdict, the reviewing court *cannot* know the means that the jury agreed upon, and it will not affirm the criminal conviction on such a record. Ortega-Martinez, at 707-08; see State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976); In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068

(1970). Instead, in such circumstances, the Washington Courts impose the modest remedy of reversal without prejudice to a retrial.

3. The decision below is entirely consistent with *Smith*. The State contends that the Court of Appeals decision conflicts with State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). But in that case, this Court held that a jury instruction setting forth the three common-law assault definitions did not create alternative statutory means of assault – rather, the instruction merely set forth a definition. Smith, at 784. Here, the statute at issue reads:

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1). The Petitioner in this case cannot colorably contend that the statute setting forth the crime of Trafficking is, or contains, a mere definition. RCW 9A.82.050. The language “initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others” cannot be read as a ‘definition’ of any term, including given the structure of the statute; rather, these are alternative means. State v. Strohm, 75 Wn. App. 301, 304-05, 879 P.2d 962 (1984). For example, there is no unanimity if some jurors convicted Mr. Owens because they believed he financed the operation through his auto business, while others rejected that claim but convicted him because they believed he initiated the operation by

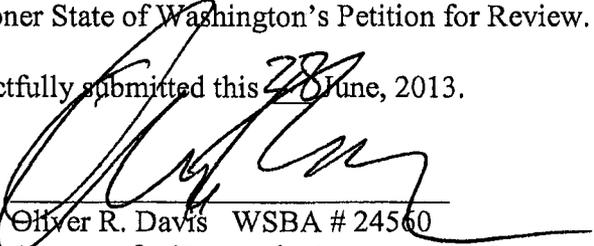
taking the car. Certainly, a general verdict in such a case is not expressly unanimous, as required in Washington.

Taking into consideration language and structure, the Washington Courts follow a reasoned analysis of the given statutory or instructional language to determine if it establishes alternative means of committing the crime, and that analysis is both comprehensible and balanced so as to have been applied in some cases to find alternative means, see, e.g., Strohm, but in many others to *reject* the defendant's contention of alternative means, see, e.g., State v. Smith, supra, 159 Wn.2d at 784; In re Personal Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988); State v. Allen, 127 Wn. Ap. 125, 127, 110 P.3d 849 (2005); State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999). The State's request that this Court abandon the alternative means doctrine which protects the right to express assurances of jury unanimity under Wash. Const. art 1, § 21 should be declined.

D. CONCLUSION

Based on the foregoing, Jeramie Owens respectfully requests that this Court deny the Petitioner State of Washington's Petition for Review.

Respectfully submitted this ~~20~~²⁸ June, 2013.



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Washington Appellate Project

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State v. Jeramie Owens
No. 88905-8

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Answer to Petition for Review

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